

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JEREMY WEST,

Plaintiff,

v.

BNSF RAILWAY CO.,

Defendant.

NO. 2:23-CV-0106-TOR

ORDER ON EXPERT TESTIMONY
AND SUMMARY JUDGMENT

BEFORE THE COURT are Defendant's Motion to Exclude the Testimony of Dr. Trangle and Motion for Summary Judgment (ECF Nos. 41, 35). These matters were submitted for consideration without oral argument. The Court has reviewed the record and files herein, the completed briefing, and is fully informed. For the reasons discussed below, Defendant's Motion to exclude the testimony of Dr. Trangle is **denied**, and Defendant's motion for summary judgment is **granted** in part and **denied** in part.

BACKGROUND

1 This case concerns claims under the Family and Medical Leave Act
2 (“FMLA”) and the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101
3 *et seq.* ECF No. 1 at 2. Plaintiff, Jeremy West (“West”), was hired by Defendant
4 BNSF in January 2014 as a conductor and later as an engineer after receiving his
5 engineer certification. *Id.* In 2020, West was diagnosed with a rare medical
6 condition, Susac Syndrome, which if untreated can cause severe headaches;
7 confusion; problems with thinking, such as short-term memory loss, slow thought
8 processing and reduced ability to solve problems; slurred speech; walking
9 difficulties; and/or changes in personality. *Id.* at 3. For the next year, West was
10 treated with medication to manage his disorder. *Id.* West applied and received
11 intermittent FMLA leave in September 2020 to attend routine appointments related
12 to his condition. *Id.* West re-applied for FMLA leave in September 2021 to
13 continue attending routine appointments. *Id.* West was subsequently removed
14 from his position at BNSF September 21, 2021. ECF No. 47-3 at 4. West initiated
15 the present action against BNSF alleging he was effectively terminated in violation
16 of the ADA and FMLA. ECF No. 1 at 4-6.

17 On September 3, 2024, BNSF moved to exclude the testimony of West’s
18 expert witness, Dr. Kevin Trangle (“Dr. Trangle”) and moved for summary
19 judgment as to all of West’s claims.

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1 DISCUSSION

2 I. Dr. Trangle's Testimony

3 Dr. Trangle is a Board Certified Occupational Medicine Director who has
4 performed numerous fitness for duty (“FDD”) examinations and determinations.
5 ECF No. 42-1 at 16. At West’s behest, Dr. Trangle conducted a review of West’s
6 medical records and produced an Independent Medical Evaluation (“IME”) report.
7 ECF No. 42-1. In his report, Dr. Trangle opined that BNSF “erred in its
8 determination that Mr. West could not safely return to his job as a Conductor.
9 Specifically, Dr. Aquino’s characterization of Mr. West as having a condition
10 which posed an unacceptable future risk of sudden incapacitation was unjustified
11 and based on an improper FFD process” *Id.* at 15.

12 BNSF argues Dr. Trangle’s report and proposed testimony should be
13 excluded under Federal Rules of Evidence (“FRE”) 702 because his analysis is
14 unreliable, irrelevant, and unduly prejudicial. ECFR No. 41 at 5. Specifically,
15 BNSF asserts that Dr. Trangle is not qualified to opine on risk assessments in the
16 railroad industry and his conclusions do not rely on scientific, technical, or other
17 specialized knowledge as required by FRE 702. ECF No. 41 at 6. BNSF argues
18 Dr. Trangle’s proposed testimony is unreliable because it is based on subjective
19 belief and unsupported speculation. *Id.* at 8.

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1 a. *Relevant law*

2 Admission of expert witness testimony is governed by Rule 702, which
3 provides in relevant part:

4 A witness who is qualified as an expert by knowledge, skill, experience,
5 training, or education may testify in the form of an opinion or otherwise
6 if the proponent demonstrates to the court that it is more likely than not
7 that:

- 8 (a) the expert's scientific, technical, or other specialized
9 knowledge will help the trier of fact to understand the evidence
10 or to determine a fact in issue.

11 FED. R. EVID. 702.

12 In evaluating whether the proffered expert testimony will facilitate the trier
13 of fact's understanding of the evidence or determination of a fact in issue under
14 Rule 702, the Court assesses both the relevance and reliability of the testimony.

15 *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-92 (1993). “Expert
16 opinion testimony is relevant if the knowledge underlying it has a ‘valid . . .
17 connection to the pertinent inquiry.’ And it is reliable if the knowledge underlying
18 it ‘has a reliable basis in the knowledge and experience of [the relevant]
19 discipline.’” *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir.
20 2006) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 1167, 1175 (1999)). The
Court possesses “broad latitude” to determine the admissibility of expert
testimony, subject only to abuse of discretion review on appeal, *Kumho Tire Co. v.
Carmichael*, 526 U.S. 137, 142 (1999) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S.

1 136, 143 (1997)). As made clear by a recent amendment to Rule 702 in December
2 2023, the burden rests with the proponent of the expert testimony to demonstrate
3 by a preponderance of the evidence that the testimony is admissible. *See* FED. R.
4 EVID. 702 Advisory Committee Note (2023).

5 *b. Analysis*

6 West seeks to use Dr. Trangle's report and proposed testimony to challenge
7 BNSF's risk assessment and subsequent finding that West presented a significant
8 risk and needed to be removed from service.

9 The determination that an individual poses a 'direct threat' shall be based on
10 an individualized assessment of the individual's present ability to safely
11 perform the essential functions of the job. This assessment shall be based on
a reasonable medical judgment that relies on the most current medical
knowledge and/or on the best available objective evidence.

12 *Eschazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1028 (9th Cir. 2003).

13 BNSF's chief medical officer, Dr. Theodore Aquino, ultimately made the
14 decision to pull West from service after a conversation with West's neurologist,
15 Dr. Craddock, and performing independent research on Susac Syndrome. ECF No.
16 37-3 at 5. Susac Syndrome is a very rare neurological condition that Dr. Aquino
17 had admittedly not heard of prior to BNSF's diagnosis. *Id.* at 28, 33. Dr. Aquino
18 based his conclusion in large part on Dr. Craddock's recommendation that BNSF
19 should not be performing his job as a locomotive engineer. *Id.* at 5-6, 11. Dr.
20 Trangle has also examined BNSF's medical records, Dr. Craddock's findings and

1 performed independent research on Susac Syndrome, thus his testimony is directly
2 relevant to West's challenge of Dr. Aquino's findings. *See* ECF No. 42-1.

3 BNSF argues Dr. Trangle is not qualified to opine on this matter because he
4 has no relevant knowledge, skill, experience, training or education. ECF No. 41 at
5 5. The Court disagrees. Dr. Trangle specializes in occupational medicine and has
6 relied on his specialized knowledge as an occupational medicine doctor in
7 numerous cases related to risk tolerance under the ADA fitness for duty assessment
8 framework. *See e.g., Baker v. Union Pac. R.R. Co.*, 580 F.Supp.3d 647 (D. Neb.
9 2022); *Montgomery v. Union Pac. R.R. Co.*, 2018 WL 6110930 (D. Ariz. Nov. 21,
10 2018); *Mills v. Union Pacific R.R. Co.*, 2024 WL 185246 (D. Idaho Jan. 16, 2024);
11 *Sanders v. Union Pacific R.R. Co.*, 2021 WL 4783629 (D. Neb. Oct. 7, 2021). As
12 for Dr. Trangle's knowledge on Susac Syndrome itself, he appears to have a
13 similar level of background knowledge on the condition as Dr. Aquino given that
14 neither were familiar with the condition before West's diagnosis and this case.
15 ECF Nos. 37-2 at 48, 37-3 at 33.

16 BNSF argues that Dr. Trangle's testimony is unreliable because his opinion
17 is based on his subjective belief and is wholly speculative. ECF No. 41 at 8. Dr.
18 Aquino came to his conclusions after a discussion with Dr. Craddock and
19 independent research. Somewhat similarly, Dr. Trangle came to his conclusions
20 after reviewing West's medical records, Dr. Aquino and West's deposition

1 transcripts, West’s job requirements, and research articles. ECF No. 42-1 at 10.
2 Dr. Trangle reviewed the underlying facts necessary to support his testimony
3 challenging Dr. Aquino’s findings. “Expert evidence of this nature . . . elucidates
4 the very issue the court must assess—whether the opinion that a direct threat
5 existed was *objectively* reasonable.” *Echazabal*, 336 F.3d at 1033.

6 For these reasons, the Court finds Dr. Trangle’s testimony to be both
7 relevant to this case and reliable. BNSF’s motion to exclude Dr. Trangle as expert
8 testimony is **denied**.

9 II. Summary Judgment

10 BNSF moves for summary judgment as to the following claims: West’s
11 claim that removing him from his position as an engineer with BNSF was in
12 violation of the ADA, West’s claim that BNSF failed to provide reasonable
13 accommodation as required under the ADA, and West’s claim that his termination
14 was in violation of the FMLA. ECF No. 35 at 2.

15 The Court may grant summary judgment in favor of a moving party who
16 demonstrates “that there is no genuine dispute as to any material fact and that the
17 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling
18 on a motion for summary judgment, the court must only consider admissible
19 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).
20 The party moving for summary judgment bears the initial burden of showing the

1 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
2 317, 323 (1986). The burden then shifts to the non-moving party to identify
3 specific facts showing there is a genuine issue of material fact. See *Anderson v.*
4 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla
5 of evidence in support of the plaintiff’s position will be insufficient; there must be
6 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

7 For purposes of summary judgment, a fact is “material” if it might affect the
8 outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is
9 “genuine” only where the evidence is such that a reasonable jury could find in
10 favor of the non-moving party. *Id.* The Court views the facts, and all rational
11 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*
12 *Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted
13 “against a party who fails to make a showing sufficient to establish the existence of
14 an element essential to that party’s case, and on which that party will bear the
15 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

16 1. *ADA Claim*

17 In response to West’s claims that BNSF removed West from his position as
18 an engineer in violation of the ADA, BNSF argues the direct threat affirmative
19 defense. An employer can defend against a disability discrimination claim under
20 the ADA by relying on a qualification standard that “may include a requirement

1 that an individual shall not pose a direct threat to the health or safety of other
2 individuals in the workplace.” 42 U.S.C. § 12111(3); *Echazabal*, 336 F.3d at
3 1027. “Because it is an affirmative defense, the burden of establishing a direct
4 threat lies with the employer.” *Echazabal*, 336 F.3d at 1027. The ADA presents a
5 specific matrix in assessing the reasonableness of the employer’s action:

6 Direct Threat means a significant risk of substantial harm to the health or
7 safety of the individual or others that cannot be eliminated or reduced by
8 reasonable accommodation. The determination that an individual poses a
9 “direct threat” shall be based on an individualized assessment of the
10 individual's present ability to safely perform the essential functions of the
job. This assessment shall be based on a reasonable medical judgment that
relies on the most current medical knowledge and/or on the best available
objective evidence. In determining whether an individual would pose a
direct threat, the factors to be considered include:

- 11 (1) The duration of the risk;
- 12 (2) The nature and severity of the potential harm;
- 13 (3) The likelihood that the potential harm will occur; and
- 14 (4) The imminence of the potential harm.

15 29 C.F.R. § 1630.2(r).

16 Dr. Aquino made the call to remove West from performing safety-sensitive
functions for BNSF based on a telephone call with Dr. Craddock and his own
17 research. BNSF’s Statement of Material Facts Not in Dispute states that “[b]ased
18 on Dr. Craddock’s recommendation that West not perform safety-sensitive work
19 and Dr. Aquino’s own research into Susac Syndrome, Dr. Aquino determined that
20

1 West was a safety risk and placed a restriction on West.” ECF No. 36 at 9-10.
2 “Dr. Aquino relied heavily on his conversation with Dr. Craddock.” *Id.* at 10.
3 However, West disagrees Dr. Craddock made any such recommendation and has
4 submitted a sworn declaration by Dr. Craddock that no such recommendation or
5 opinion was made during the telephone call with Dr. Aquino. ECF No. 48. BNSF
6 argues that Dr. Craddock’s declaration does not create genuine dispute of material
7 fact because the undisputed fact is that Dr. Aquino relied heavily on his
8 conversation with Dr. Craddock in making his decision which the occurrence of is
9 not in dispute. ECF No. 51 at 10. Further, BNSF argues the governing standard
10 for a direct threat defense is only whether Dr. Aquino’s decision was objectively a
11 reasonable medical judgment. ECF No. 50 at 3-4.

12 First, the Court is not persuaded by BNSF’s attempt to skirt around its own
13 statement that Dr. Aquino relied on Dr. Craddock’s recommendation in his
14 decision to pull West from his position. Dr. Aquino states in both his deposition
15 transcript (ECF No. 37-3) and his declaration in support of BNSF’s motion for
16 summary judgment (ECF No. 38) that his decision to pull West from performing
17 safety-sensitive job duties was heavily based on Dr. Craddock’s opinion that West
18 should not perform such duties and his own independent research on Susac
19 Syndrome. ECF Nos. 38 at 3, 37-3 at 6-7.

1 Second, the governing standard on a direct threat defense is whether the
2 employer performed an “individualized assessment” “based on a reasonable
3 medical judgment that relies on the most current medical knowledge and/or on the
4 best available objective evidence.” 29 C.F.R. § 1630(r). “[A]nalysis of direct
5 threat ‘requires the employer to gather substantial information about the
6 employee’s work history and medical status, and disallows reliance on subjective
7 evaluations by the employer.’” *Echazabal*, 336 F.3d at 1033 (quoting *Nunes v.*
8 *Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999)).

9 West contends Dr. Aquino’s conversation with Dr. Craddock and subsequent
10 research on Susac Syndrome was plainly not an individualized decision based on
11 substantial information of West’s work and medical history. ECF No. 45 at 6.
12 BNSF argues Dr. Aquino’s conversation with Dr. Craddock constituted an
13 individualized assessment because the discussion addressed three of the four
14 assessment factors: the duration of risk, the likelihood that the potential harm will
15 occur, and the imminence of the potential harm. ECF No. 35 at 9-10. However,
16 Dr. Craddock’s declaration states that during the conversation with Dr. Aquino, the
17 likelihood of potential symptoms related to Susac Syndrome occurring for West
18 specifically was never even addressed. ECF No. 48. BNSF further argues that
19 West’s medical records memorialize Dr. Craddock’s communications with West
20 and confirm she agreed with Dr. Aquino’s assessment to remove West from his

1 position. ECF No. 50 at 6-7. But even if the Court agreed with BNSF, BNSF was
2 still required to make an individualized assessment that West posed a direct threat
3 at the time of removal. *Nunes*, 164 F.3d at 1248 (“To protect disabled individuals
4 from discrimination based on prejudice, stereotypes, or unfounded fear, the
5 Supreme Court has required an individualized direct threat inquiry that relies on
6 the best current medical or other objective evidence.”); *Echazabal*, 336 F.3d at
7 1031 (“Had Chevron conducted the individualized assessment required by law, it
8 would have considered in detail the four *Arline* factors as they applied to
9 Echazabal's condition.”). BNSF's reference to medical records after the fact does
10 not alleviate this requirement, and Dr. Aquino never states that he reviewed West's
11 medical records before making his decision. Therefore, a material issue of fact
12 exists as to whether BNSF properly conducted an individualized assessment as
13 required in a direct threat analysis. 29 C.F.R. § 1630(r).

14 Even if the Court could find BNSF performed an individualized assessment
15 of West, West's expert, Dr. Trangle, disagrees with Dr. Aquino's risk assessment
16 of West. See ECF No. 47-3. Particularly that West posed an unacceptable future
17 risk of sudden incapacitation which Dr. Trangle concluded based on his evaluation
18 of West's work and medical history and his own research on Susac Syndrome. *Id.*
19 West has presented sufficient evidence that reasonable minds may differ on
20

1 whether Dr. Aquino's assessment of the direct threat posed by West was
2 objectively reasonable.

3 West has raised a material issue of fact as to BNSF's direct threat defense,
4 therefore summary judgment as to this issue is **denied**.

5 *2. Reasonable Accommodation*

6 West claims BNSF failed to provide reasonable accommodation in violation
7 of the ADA. ECF No. 45 at 9. BNSF contends that BNSF did offer West a
8 reasonable accommodation which West rejected necessarily defeating his claim.
9 In the alternative, BNSF also argues West's limitations on acceptable jobs preclude
10 his reassignment claim and it was not obligated under the ADA to place West in
11 one of the forty-seven positions identified by West. ECF No. 35 at 10-18.

12 The ADA, 42 U.S.C. § 12112(a), (b)(5)(A), requires that an employer make
13 reasonable accommodations to an employee's disability. "Once an employer
14 becomes aware of the need for accommodation, that employer has a mandatory
15 obligation under the ADA to engage in an interactive process with the employee to
16 identify and implement appropriate reasonable accommodation." *Humphrey v.*
17 *Memorial Hospitals Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001). "The interactive
18 process requires communication and good-faith exploration of possible
19 accommodations between employers and individual employees, and neither side
20 can delay or obstruct the process." *Id.* "The ADA treats the failure to provide a

1 reasonable accommodation as an act of discrimination if the employee is a
2 ‘qualified individual,’ the employer receives adequate notice, and a reasonable
3 accommodation is available that would not place an undue hardship on the
4 operation of the employer’s business.” *Snapp v. United Transp. Union*, 889 F.3d
5 1088, 1095 (9th Cir. 2018); *see also* 42 U.S.C. § 12112(b)(5). “The term
6 ‘reasonable accommodation’ may include . . . reassignment to a vacant position...”
7 42 U.S.C. § 12111(9)(B).

8 Only the reasonable accommodation component is in dispute here. West
9 argues BNSF did not engage in a good faith interactive process because it refused
10 to hire West into multiple positions that could have easily accommodated him.
11 ECF No. 45 at 11. It is undisputed that West applied for forty-seven positions
12 within BNSF (ECF Nos. 36 at 18-19, 45 at 13), however, the parties do disagree on
13 the reassignment options West was willing to actually accept and what BNSF’s
14 obligations were in offering a position.

15 i. BNSF’s offered position

16 BNSF first argues that it did offer West a reassignment opportunity in 2022
17 which West rejected and such rejection either cut off the interactive process or
18 rendered West no longer a qualified individual under the ADA pursuant to 29
19 C.F.R. § 1630.9(d). ECF No. 35 at 12-13. Under § 1630.9(d), an individual is not
20 required to accept an accommodation offered by an employer, however, “if such

1 individual rejects a reasonable accommodation, . . . that is necessary to enable the
2 individual to perform the essential functions of the position held or desired, and
3 cannot, as a result of that rejection, perform the essential functions of the position,
4 the individual *will not be considered qualified.*" 29 C.F.R. § 1630.9(d) (emphasis
5 added). BNSF also cites to one unpublished Ninth Circuit case and a previous case
6 before this Court as support. *See Reza v. Int'l Game Tech.*, 351 F. App'x 188, 190
7 (9th Cir. 2009); *Vincent v. BNSF Ry. Co.*, No. 10-CV-0347-TOR, 2012 WL
8 5929954 (E.D. Wash. Nov. 27, 2012). The position in question was a
9 controller/operator (telegraph) position in Pasco, Washington. ECF No. 40 at 4-5.

10 West argues that the position was a significant pay cut and required
11 relocating his family. ECF No. 45 at 12. West also alleges BNSF intentionally
12 offered the position after West filed his claim for the purpose that West would
13 reject it, thereby giving BNSF an argument West turned down a reasonable
14 accommodation. *Id.* Finally, West argues that an alternative position is not a
15 reasonable accommodation where it does not suit the disabled employee's needs
16 and other positions were available that did involve a significant pay cut that West
17 was open to. ECF No. 45 at 12-13. West also cites to only nonbinding authority.
18 *See Weeks v. Union Pac. R.R. Co.*, 137 F. Supp. 3d 1204, 1223 (E.D. Cal. 2015);
19 *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 99 (2d Cir. 1999).

1 The reasonable accommodation dispute in the previous case before this
2 Court, *Vincent v. BNSF Ry. Co.*, had dissimilar facts and, in part, concerned
3 whether the offered position by BNSF was a reasonable reassignment with
4 essential functions the plaintiff could actually perform with her disability. *Vincent*,
5 2012 WL 5929954, at *6. However, the Court does find the unpublished Ninth
6 Circuit case, *Reza v. Int'l Game Tech.*, to be somewhat informative. The court
7 there upheld a lower court's summary judgment ruling that the plaintiff was no
8 longer a qualified individual under the ADA after she rejected a reassignment to a
9 position that could meet her needs. The court concluded that the reassignment was
10 a reasonable accommodation because no accommodation was available to permit
11 the plaintiff to perform in her previous role, and "there was no vacant equivalent
12 position to which IGT could reassign" her. *Reza*, 351 F. App'x at 190. This
13 reasoning suggests the Ninth Circuit may find a proposed reassignment to be an
14 unreasonable accommodation where a more equivalent vacant position exists.

15 At the time BNSF offered West the control operator position, West had also
16 filed an application for a position BNSF later determined West qualified for. ECF
17 No. 36 at 17-18, 24. Thus, West has raised an issue of whether the offered position
18 was a reasonable accommodation in light of other available positions *if* they
19 qualified as a reasonable accommodation as discussed below.

20 //

1 ii. West's applications

2 BNSF argues West's failure to accommodate claim also fails because it was
3 limited in accommodations it could offer West and was not obligated to offer West
4 any of the positions he applied for. BNSF alleges West was not interested in a
5 craft transfer, despite applying for positions that required a craft transfer, and his
6 geographical area of interest was limited to Spokane. ECF No. 35 at 14. BNSF
7 supports this with West's discussions with BNSF's vocational rehabilitation
8 specialist, Anthony Frazier ("Frazier"), expressing these desires early on in the job
9 searching process (ECF No. 40). BNSF also provides an email from West's
10 counsel to Frazier stating West was willing to work in another position for BNSF
11 "provided it does not require him to relocate and/or forfeit his seniority." ECF No.
12 40-5. BNSF reasons that this evidence shows West would not have actually
13 accepted any positions he applied for that involved a craft transfer or relocation
14 outside his restricted geographical area of interest, thereby alleviating BNSF's duty
15 to even offer them.

16 West contends that while early on he did express a desire to relocate to
17 either Spokane or Fort Worth, he became open to relocations elsewhere as
18 evidenced by his applications to positions in other areas. ECF Nos. 37-1 at 71, 45
19 at 13. Additionally, also as evidenced by his applications, West claims he was
20 willing to lose seniority through a craft transfer if the proposed position offered a

similar pay to his position as a locomotive engineer. ECF No. 37-1 at 65. West further argues that regardless of any discussion regarding his work preferences with BNSF, it did not mean he was not willing to work the positions for which he applied, and BNSF's refusal to place him in a position for which he was qualified was a violation of its duty to provide reasonable accommodation. ECF No. 45 at 13. The Court finds a genuine issue exists as to whether West would have accepted a position he qualified for. Thus, the Court must next address whether the positions West qualified for amounted to a "reasonable accommodation" under the ADA.

Of the forty-seven applications, it is undisputed West qualified for four. ECF Nos. 36 at 24. However, he was rejected for each, without an interview, for the following reasons given by BNSF:

- Track Maintenance (Laborer, Truck Driver, Welder) (Bonners Ferry, ID) (81056): The disposition code on Mr. West's Candidate Profile indicates that he had other applications where he was being considered at the same time. When that situation occurs, the recruiting manager does not process the application so as not to interfere with other hiring for other position(s).
- Signal Apprentice (Bonners Ferry, ID) (89610): The disposition code on Mr. West's Candidate Profile indicates that as of the time his application was processed, BNSF was no longer interviewing for that position.
- Signal Apprentice (Spokane, WA) (90052): Mr. West was not eligible for this position because a craft transfer was not permitted for the position. In addition, Mr. West was not the best-qualified candidate for the position.

- 1 • Dispatcher Trainee (Ft. Worth, TX) (90091):
2 Mr. West was not the best qualified candidate for this position.

3 ECF No. 39 at 7-8.

4 BNSF's employment policy states "BNSF selects the most qualified
5 candidate for an open position, whether the candidates being considered are
6 internal (existing BNSF employees), external, or both." ECF No 39-1 at 1. The
7 parties disagree on whether BNSF was required to offer West a position he
8 qualified for regardless of whether he was the best qualified candidate. Circuits
9 are split on whether reassignment is a reasonable accommodation where it conflicts
10 with an employer's policy of hiring the best qualified candidate. The split stems
11 from the Supreme Court case *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002),
12 where the Court held it was not reasonable to require an employer reassign a
13 qualified employee under the ADA to a vacant position in violation of its seniority
14 system.

15 The Court reasoned that where a proposed accommodation would not be
16 reasonable in the run of cases, it was unreasonable as a matter of law. The Court
17 then held that a proposed accommodation in violation of a seniority policy is
18 ordinarily sufficient as a matter of law that an "accommodation" is not reasonable.
19 *Id.* at 391. The Court in part based its decision on analogous case law recognizing
20 the importance of seniority systems to employee-management relations. *Id.* at 403.

1 The Court states that whether collectively bargained or unilaterally imposed by
2 management,

3 the typical seniority system provides important employee benefits by
4 creating, and fulfilling, employee expectations of fair, uniform treatment.
5 These benefits include “job security and an opportunity for steady and
6 predictable advancement based on objective standards.” . . . And they
consequently encourage employees to invest in the employing company,
accepting “less than their value to the firm early in their careers” in return
for greater benefits in later years.

7 *Id.* at 404.

8 Since *Barnett*, four circuits have held that an employer’s best qualified
9 candidate policy fall under the same principles as the seniority based system
10 reasoning in *Barnett*. *Elledge v. Lowe’s Home Centers, LLC*, 979 F.3d 1004, 1016
11 (4th Cir. 2020) (“In the ordinary ‘run of cases,’ reassignment in contravention of
12 such a policy would not be reasonable.”); *Equal Emp’t Opportunity Comm’s v.*
13 *Methodist Hosps. of Dallas*, 62 F.4th 938, 945 (5th Cir. 2023) (“When the lives of
14 patients are on the line, mandatory reassignment in violation of a best-qualified
15 system is unreasonable in the run of cases.”); *Huber v. Wal-Mart Stores, Inc.*, 486
16 F.3d 480, 483 (8th Cir. 2007); *Equal Emp’t Opportunity Comm’s v. St. Joseph’s*
17 *Hosp., Inc.*, 842 F.3d 1333, 1346 (11th Cir. 2016).

18 However, three other circuits have held the ADA requires reassignment of a
19 qualified individual to a vacant position, regardless of the existence of a best-
20 qualified candidate policy, unless the employer can show undue hardship. *Smith v.*

1 *Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999); *Equal Emp't Opportunity*
2 *Comm'n v. United Airlines*, 693 F.3d 760, 764-65 (7th Cir. 2012); *Aka v. Wash.*
3 *Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998). “While employers may prefer
4 to hire the best qualified applicant, the violation of a best-qualified selection policy
5 does not involve the property-rights and administrative concerns (and resulting
6 burdens) presented by violation of a seniority policy.” *United Airlines, Inc.*, 693
7 F.3d at 764. Thus, equating a best-qualified selection policy to a seniority system
8 so enlarges “the narrow, fact-specific exception set out in *Barnett* as to swallow the
9 rule.” *Id.*

10 The Equal Employment Opportunity Commission, which is charged in part
11 for administering the ADA, also provides guidance on this issue:

12 The ADA specifically lists "reassignment to a vacant position" as a form of
13 reasonable accommodation. This type of reasonable accommodation must be
14 provided to an employee who, because of a disability, can no longer perform
15 the essential functions of his/her current position, with or without reasonable
16 accommodation, unless the employer can show that it would be an undue
17 hardship. An employee must be "qualified" for the new position. . . . The
18 employee does not need to be the best qualified individual for the position in
19 order to obtain it as a reassignment.

20 EEOC Guidance: Reasonable Accommodation and Undue Hardship Under the
21 Americans With Disabilities Act (2002).

22 The Ninth Circuit has yet to take a position, therefore the Court chooses to
23 align with the latter circuits' reasoning. As those circuits all agree, reassignment as

1 form a reasonable accommodation would be of little value if it simply permitted an
2 employee to compete for a vacant position. *See Smith*, 180 F.3d at 1170 (“On the
3 contrary, ‘[n]umerous courts have assumed that the reassignment obligation means
4 something more than treating a disabled employee like any other job applicant.’”).
5 Additionally, the Tenth Circuit addressed BNSF’s very argument in *Lincoln v.*
6 *BNSF Railway Co.*, 900 F.3d 1166 (10th Cir. 2018). “Under BNSF’s logic, every
7 employer could adopt a policy in favor of hiring the most qualified candidate such
8 that a disabled employee could never rely on reassignment to establish the
9 existence of a reasonable accommodation for purposes of his *prima facie* case.”
10 *Lincoln*, 900 F.3d at 1206.

11 BNSF cites to the unpublished case *Gamez-Morales v. Pac. Nw. Renal*
12 *Servs., LLC*, 304 F. App’x 572 (9th Cir. 2008), as evidence the Ninth Circuit
13 would most likely align with the first group of circuits holding a best qualified
14 candidate policy makes a mandatory reassignment unreasonable. ECF No. 35 at
15 18. However, as West points out, that case concerned an employer’s policy
16 prohibiting transfer of an employee within six months of a disciplinary action.
17 *Gamez-Morales*, 304 F. App’x at 574. Other district courts within the Ninth
18 Circuit have also reached the same conclusion as this Court now does. *See*
19 *Thornton v. Providence Health Sys.-Oregon*, No. 05-40-KI, 2005 WL 3303944, at
20

1 *5 (D. Or. Dec. 5, 2005); *Betti v. Kaiser Permanente*, No. CIVS03-2678DFL
2 DAD, 2005 WL 3844212, at *4 (E.D. Cal. July 25, 2005).

3 Here, BNSF and West do not dispute that West was a qualified candidate for
4 at least four of the positions he applied for. Nor do the parties dispute that West
5 was rejected from at least one of the positions he qualified for due to not being the
6 best qualified candidate (Dispatcher Trainee (Ft. Worth, TX). The Court finds that
7 BNSF was not permitted to reject West from a position he otherwise was qualified
8 for based on its best qualified candidate policy unless BNSF can show
9 reassignment was either unreasonable in this particular case or would place an
10 undue hardship on BNSF. *See Barnett*, 535 U.S. at 401-02 (explaining once the
11 plaintiff shows an “accommodation” seems reasonable on its face, “the
12 defendant/employer then must show special circumstances that demonstrate undue
13 hardship in the particular circumstances”). BNSF has not provided support of
14 undue hardship but has raised an issue of whether West participated in the
15 interactive process in bad faith by applying for positions he had no intention of
16 accepting. Either way a genuine issue exists as to West’s failure for reasonable
17 accommodation claim, therefore, summary judgment must be **denied**.

18 3. *Retaliation Under the FMLA*

19 West brought two claims under the FMLA, retaliation 29 U.S.C. §
20 2615(a)(1) and discrimination, 29 U.S.C. § 2615(a)(2). Specifically, 29 U.S.C. §

1 2615(a)(1) states, “It shall be unlawful for any employer to interfere with, restrain,
2 or deny the exercise of or the attempt to exercise, any right provided under this
3 subchapter.” Whereas 29 U.S.C. § 2615(a)(2) states, “It shall be unlawful for any
4 employer to discharge or in any manner discriminate against any individual for
5 opposing any practice made unlawful by this subchapter.” BNSF contends West
6 does not allege any facts or argument to support a claim under § 2615(a)(2),
7 therefore making summary judgment appropriate. ECF No. 35 at 19. West does
8 not dispute this in his response but rather focuses on a § 2615(a)(1) claim. ECF
9 No. 45 at 17-18.

10 While the statutory language of § 2615(a)(2) has caused some confusion
11 among courts as to what type of conduct it prohibits, the Ninth Circuit has clarified
12 “it does not cover visiting negative consequences on an employee simply because
13 he has used FMLA leave. Such action is, instead, covered under § 2615(a)(1), the
14 provision governing ‘Interference [with the] Exercise of rights.’” *Bachelder v. Am.
15 W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001) (citation omitted). Here,
16 West is alleging he suffered an adverse employment action because he took FMLA
17 leave (ECF Nos. 1 at 6, 45 at 17-18), thus, § 2615(a)(2) is not implicated therefore
18 summary judgment is **granted** as to that claim.

19 To prevail on an interference claim under § 2615(a)(1), West must “prove
20 by a preponderance of the evidence [his] taking of FMLA-protected leave

1 constituted a negative factor in the decision to terminate [him]." *Bachelder*, 259
2 F.3d at 1125. West may use direct or circumstantial evidence in proving his claim.
3 *Id.* BNSF argues that Dr. Aquino became aware of West's condition from his
4 FMLA leave application, but that does suggest BNSF held the FMLA leave itself
5 against West. ECF No. 35 at 21.

6 West's response argument is that he availed himself of a protected FMLA
7 right when he requested FMLA leave, he suffered an adverse employment
8 condition after BNSF removed him from his position, and that decision stemmed
9 from West requesting the leave because he had to divulge his medical information
10 to BNSF to explain why he needed the leave. ECF No. 45 at 17-18. What West is
11 actually arguing is that he was removed from his position due to his underlying
12 medical condition, not for taking FMLA leave. West's attempt to create a causal
13 connection between the FMLA leave itself and the adverse employment decision
14 fails as a result. West cites to *Lamonaca v. Tread Corp.*, 157 F. Supp. 3d 507
15 (W.D. Va. 2016) in support of his argument but that case is unpersuasive. The
16 issue there was whether the plaintiff engaged in a protected activity when she
17 requested medical leave, and the defendant terminated her in retaliation of that
18 request. *Tread*, 157 F. Supp. 3d at 517.

19 Here, BNSF removed West from service after learning of West's medical
20 diagnosis. ECF 45 at 21. West provides no evidence that raises a triable issue that

1 BNSF removed West from his position *because* he exercised his right in requesting
2 FMLA leave. West's contention that his termination "flowed" from his request for
3 FMLA leave because he divulged his medical condition which was the basis for his
4 removal is insufficient to show a causal connection between both actions. ECF
5 No. 45 at 17. Therefore, summary judgment is **granted** as to West's § 2615(a)(1)
6 claim.

7 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 8 1. Defendant's Motion to Exclude the Expert Opinion Testimony of Dr.
9 Kevin Trangle (ECF No. 41) is **DENIED**.
10 2. Defendant's Motion for Summary Judgment (ECF No. 35) is **granted**
11 **in part** and **denied in part**.

12 The District Court Executive is directed to enter this Order and furnish
13 copies to counsel.

14 DATED November 1, 2024.



15 A handwritten signature in blue ink that reads "Thomas O. Rice".
16 THOMAS O. RICE
17 United States District Judge
18
19
20